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NO. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

SUPPLEMENTAL BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In response to this Court's invitation to express the views of the United States, the Solicitor General has recommended that the Petition for Writ of Certiorari be denied. The Washington State petitioners submit two short

observations about that response by the United States.[1]

1. If the writ is denied, the Ninth Circuit will apply the decision below, which the Solicitor finds to be flawed, to reservations that lie within its jurisdiction.

Although the United States would have this Court deny the writ, the Solicitor's brief candidly indicates that it is "unpersuaded, however, by the analysis set forth by the Court of Appeals in part II of its opinion." (U.S. Brief at 9.) That portion of the Ninth Circuit opinion expresses its construction of the principles enunciated by this Court in California

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[1] This Supplemental Brief is filed pursuant to Rule 15.7, which authorizes a party to file a supplemental brief calling attention to intervening matters not available at the time of the parties last filing. The intervening matter in this case is the Brief for the United States as Amicus Curiae which was filed after Petitioners' Reply Brief.

v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

The United States' brief describes the Ninth Circuit's approach as "overly wooden" and goes on to suggest a "more commonsense application of the Cabazon analysis", (U.S. Brief at 10), than that employed by the Ninth Circuit. Although disagreeing with part II of the opinion, the Solicitor urges the Court to deny the writ because part I of the decision is correct.[2]

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[2] The Solicitor also maintain that there is no conflict between the decision below and St. Germaine v. Circuit Court of Vilas Cy, 938 F.2d 75 (7th Cir. 1991). The Solicitor's analysis focuses on part I of the decision below. (U.S. Brief at 11.) However, as we pointed out in our petition (pp. 10-12), there is a conflict between St. Germaine and part II of the decision below. The Solicitor does not claim otherwise.

This ignores the fact that the Ninth Circuit will continue to apply a flawed analysis of Cabazon. Thus, the disagreement between the Ninth Circuit and the United States Solicitor is critical because the Ninth Circuit will continue to use their analysis, not the Solicitor's, in applying this Court's decision in Cabazon.

When one considers that a large number of the tribal reservations in the United States are included within the jurisdiction of the Ninth Circuit Court of Appeals, this difference in construction is thus an important matter that should be resolved by this Court.

2. The decision below either creates a jurisdictional void or permits the tribe to affirmatively preempt the state's jurisdiction.

The United States' brief recites that "the decision of the court of

appeals does not leave a jurisdictional void preventing enforcement of traffic laws on the Tribe's Reservation. To the contrary, the Tribes have enacted a traffic code applicable to the reservation and have entered into cross-deputization arrangements . . . ." (U.S. Brief at 11.) What the United States' brief overlooks is that there are twenty-four tribal reservations in the State of Washington. If the state lacks jurisdiction then there is void unless each Tribe chooses to enact and enforce traffic controls for their members.

In that context, the United States' observation that there is no void is in error unless the United States views the state's jurisdiction as being dependent upon the exercise of jurisdiction by the tribe. If so, then there is no void due

to the action taken by the Colville Tribe. But such a "springing jurisdiction" would authorize tribes, by their own action, to preempt the state. That would be a new and novel concept to view state jurisdiction vis-a-vis tribal members and such a concept should be subjected to scrutiny by this court.[3] The United States' brief thus focuses upon only one of the twenty-four reservations in Washington that is subject to being impacted by the Ninth Circuit decision. Such focus, while proper from the vantage point of the Colville Tribe, avoids the question of whether this Court should review the Ninth Circuit decision due to its

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[3] As we noted in the State's Reply Brief (p. 3) the Question Presented by the Respondent also implies that the State's jurisdiction is somehow limited by tribal enforcement action.

broader impact. This decision is more than an impact upon a single tribal reservation.

Since the United States candidly admits the reasoning of the Ninth Circuit is flawed and, by implication, raises the novel question of "springing jurisdiction," we urge this Court to grant the writ.

DATED this 1st day of April, 1992.

Respectfully submitted,

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